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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 446

IN THE MATTER

of

The Accounting of Joseph Polizzo, as Committee of the Estate of MINNIE POLIZZO, an Incompetent.

AGNES W. TYMANN, as Administratrix of the Estate of MINNIE POLIZZO, Deceased,

Petitioner,

HARRISON B. WRIGHT, Individually, and as Executor of JOSEPH POLIZZO, Deceased, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO NASSAU COUNTY SUPREME COURT OF NEW YORK STATE AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HARRISON B. WRIGHT,
Individually and as Executor of the Estate of Joseph Polizzo, deceased,
Respondent,
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Rockville Centre, N. Y.

RO 6—0880.

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Facts

Prior to her marriage to Joseph Polizzo, Amelia Anna Polizzo (also known as Minnie Polizzo) held a bond and mortgage in her own name. In 1917 she assigned the bond and mortgage first to an attorney, who immediately by assignment of even date assigned the bond and mortgage to

"Joseph Polizzo and Amelia Anna Polizzo, his wife." Both assignments recited a consideration "of other good and valuable consideration and the sum of one hundred dollars", and were in the usual form excepting that in the assignment to Polizzo and his wife the habendum clause read "to the successors, legal representatives the survivor, such survivor's heirs, assigns of the party of the second part."

Eleven years later Amelia Anna or Minnie Polizzo was committed to a State mental institution. Some years later Joseph Polizzo, her husband, was duly appointed her Committee. By assignment dated September 10, 1947, Joseph Polizzo assigned "all of my right, title and interest, *being a one-half share or interest therein*" in said mortgage, the principal of which had been reduced to $17,000, to Harrison B. Wright, which assignment recites that a full considera tion of $8,500 had been paid. On the hearing before the Trial Court the question of consideration was not involved as that question had not been raised by the Special Guardian. The petition (p. 3, third paragraph) says "The recited consideration of $8,500 was not paid (116)." That is an absolute misstatement. The consideration was paid. That it is a misstatement the page of the Record on Appeal to which petitioner refers shows. Whether it was or not is immaterial in this case and was not considered by any of the State Cou 's. The Appellate Division (Opinion of Appellate Division, appendix A, p. 21, bottom) says: "As for the unpaid balance of the consideration for said assignment to Wright, that remains to be accounted for in the husband's estate."

The sole objection of William B. Hoffman, then Special Guardian for Minnie Polizzo and now counsel for the petitioner herein, to the executor's account of the proceedings of the deceased Committee, was that there was included in that account only a one-half interest in the said bond and mortgage rather than the full interest therein, the Special Guardian's contention being that Joseph Polizzo received

nothing under the assignment to himself and his wife other than ownership in the event that he survived his wife. There was a long delay in the probate of the will due to inability to locate heirs and next of kin, and the account as filed was approved in every respect and with no objection other than the above. Actually Joseph Polizzo himself left no estate other than what remained unpaid to him under the agreement for the purchase of this assignment.

The Sole Question of Law Involved

The basic question involved is simply this: Under the assignment of mortgage to "Joseph Polizzo and Amelia Anna Polizzo, his wife", there having been included in the habendum clause the words "survivor, survivors" etc., did Joseph Polizzo receive the right to sell, transfer and assign an undivided one-half interest in the bond and mortgage?

In New York State there are but two estates in personal property. It is held either as tenants in common or as joint tenants. There is no "tenancy by the entirety" in personal property. Personal property can, of course, be held in a different manner provided it is done by agreement. Joseph Polizzo and his wife were not tenants in common. The use of the words "survivor, survivors" created the right of survivorship, which is the distinguishing feature as between tenants in common and joint tenants. Under a joint tenancy, if the property is continued to be held until the death of one tenant, the survivor takes. But it is unquestionably the law of the State of New York that a joint tenant may sever the tenancy by selling or transferring his interest in the jointly-held property, and if there are but two joint tenants that interest is an undivided one-half, and the assignee of a joint tenant then becomes a tenant in common with the other original joint tenant. That is exactly what happened in this case. Amelia Anna or Minnie Polizzo became a tenant in common with Harrison B. Wright.

The Special Guardian for the incompetent (now the attorney for the petitioner) and the Trial Court described Mr. and Mrs. Polizzo as joint tenants but at the same time argued that it was not strictly a joint tenancy but analogous to a joint tenancy, or in effect an exception to the rule, claiming that there is a presumption in the law of New York State that when a husband owning personal property purchased entirely with his own funds assigns that personal property to himself and his wife under an assignment absolute on its face, he nevertheless intends not to assign to his wife any absolute interest but at all times retains "sole ownership, control, and right of disposition" as to both principal and income during his lifetime, and that all he "intends" to give his wife is the right to take by survivorship if she happens to survive him and he has not previously disposed of the property. At no time did the Special Guardian or the Trial Justice point out the reason or source of this exception or show why this particular case came within such an exception if it existed. And both the Appellate Division of the Supreme Court of New York, Second Department, and the Court of Appeals found that such presumption, if existing, does not apply to a transfer by a wife to a husband.

Under the various statutes which have been adopted in the State of New York a man and his wife may deal one with the other as fully and as freely as any two persons may deal with one another. They may convey to one another without restriction. To say in this age that when a man owning property transfers by written assignment that property to himself and his wife without any restricting clause, he means and intends that he is still to be the sole owner of that property, is neither reasonable nor logical.

At common law a husband could transfer and convey nothing to his wife. Any attempt to do so was a nullity and he retained full ownership, control and right of dis-

position. A wife could neither take, hold nor transfer property. She had none. But in a case where a husband owning certain securities which he had purchased with his own funds made a written assignment of those securities to the names of himself and his wife, and continued to hold those securities in that fashion until his death, a Court of Equity, when the widow claimed by right of survivorship, held that while the husband as a matter of law retained full ownership, control and right of disposition while he lived, nevertheless he must have intended to provide for and give some rights in the property to his wife and so, as in many other cases where the Courts of Equity found the narrow rules of the common law inequitable, held that there was a "presumption" of the intention upon the part of the husband that his wife, while receiving no rights during his lifetime, was to take the property if she survived him.

Under the common law there was no "presumption" that the husband intended to retain full ownership, control and right of disposition. Under the law he had full ownership and could not transfer it to his wife. The only fiction which the Court invoked was the "presumption" that the husband intended his wife to take through survivorship.

At common law a "presumption" as held by the Trial Court to exist and as argued by the Special Guardian in this case could not have applied to a transfer by a wife. A wife had no ownership to be transferred to her husband or any other person. All ownership being in her husband, she could neither take, hold nor transfer either ownership or right of survivorship, and so certainly could not have had any "presumed" intention.

Question Presented

It is respectfully submitted that if there is any constitutional question here, it is as follows: "Is it a denial of equal protection of the law to hold that a transfer of a

bond and mortgage, without consideration, by a husband to himself and his wife creates a presumption that he intended to retain sole ownership, control and right of disposition of the bond and mortgage during his lifetime and intended to give her only a right of survivorship, and that a like transfer of a bond and mortgage by a wife to her husband and herself does not raise such a presumption?"

Reasons for Not Granting Writ

I

The question was not properly presented.

This alleged constitutional question was not raised at any stage of the proceedings in the Supreme Court of the State of New York or in the Appellate Division of that Court or in the Court of Appeals until the petitioner moved in the Court of Appeals, after its decision, for reargument. And it was not then raised by the notice of motion but only in the brief submitted by the petitioner on the motion. The motion for reargument was denied. This question not having been raised before the Trial Court or in the Appellate Division or in the Court of Appeals until after its final decision, there was no opportunity for any of these Courts to properly pass upon the question or for the respondents to meet the question.

II

Petitioner argues that it is the law of New York State that where a husband assigns a mortgage to himself and his wife, without consideration, a presumption arises that:

1. A right of survivorship is created in the wife.
2. He intends to retain ownership, control and right of disposition in himself.

The question of a presumption as to survivorship does not arise in this case. The words of survivorship in the habendum clause of the assignment in question created a right of survivorship in both husband and wife. No presumption is necessary.

The question of retention of ownership, control and right of disposition does arise in this case, and respondent emphatically contends that such a presumption of intention is not the law of New York State, whether it be a husband or wife who makes the transfer.

All cases cited in the briefs and opinions in this proceeding are cases where the husband had died and all deal with the question of survivorship only excepting the case of *Belfanc* v. *Belfanc*, 252 App. Div. 453, aff'd 278 N. Y. 563 (relied upon by the Trial Court and petitioner as authority for the alleged presumption). In that case the husband was alive, was the one who made the transfer and this alleged "presumption" was advanced in his behalf. The holding that there is such a presumption of ownership, if there was such a holding in that case, was not necessary to the decision of the Court for the reason that the facts were established by the uncontradicted testimony of the husband, of the lawyer who drew the instrument in question and of the wife herself, who was claiming a one-half interest as against her husband.

And so the *Belfanc* case is not authority for the existence of such a rule in New York. From the above it follows that the decision of the Court of Appeals in the present case that Minnie Polizzo, the wife, did not retain ownership, control and right of disposition, did not deny equal protection of the laws to her since the same rule applies to the husband.

The petitioner (p. 4) states that the Court of Appeals held in the present case that a transfer by a husband to himself and his wife, without payment of any considera-

tion, in the absence of any proof to the contrary, creates a presumption that the wife is to have survivorship rights only. Petitioner undoubtedly refers to the statement in the prevailing opinion in the Court of Appeals (p. 10, appendix A) to that effect, citing certain cases including *Belfanc* v. *Belfanc* which is discussed above. In all of these cases excepting the *Belfanc* case the husband who made the transfer had died and the question of present ownership was not involved. It is respectfully submitted that that statement was not necessary to the decision in this case which did not involve a transfer by a husband but which involved a transfer by a wife.

III

If the Court of Appeals of the State of New York, relying solely upon the "presumption of intention" alleged by the petitioner to exist in favor of a husband, in a case where there was no other evidence of the existing intention, and respondent believes that there is no such case, has ever held that there is a presumption that a husband retains ownership, control and right of disposition, then it is respectfully submitted that any such holding in favor of a husband was unconstitutional as it would have discriminated as against the wife.

As hereinbefore shown and is claimed by the petitioner, the basis for the alleged presumption lies in the old common law due to the fact that the husband then had sole ownership of all properties. The passage of the Married Women's Acts eliminated this particular segment of the common law (*Hiles* v. *Fisher,* 144 N. Y. 306, at pages 314 and 315), and further as stated in the petition herein (p. 6), the common law rule no longer has any existence and "regardless of whether this common law rule is in existence or not, when the common law is contrary to the Constitution of the United States, the common law must yield."

IV

The petition (p. 5, third paragraph) says that it is true that a State can make a distinction in the law between men and women but such distinction must be founded upon a reasonable basis, having in mind the general welfare of (or ?) public morals.

If the Court of Appeals has at some prior time decided that the husband had this right which his wife did not have, then should it not be assumed that the Court had a reasonable basis for the distinction? Might not that reason have been that the law has always held that the husband is responsible for his wife's support and therefore in making any transfer of property in which he intended to give her some interest he still, being liable for her support, wanted to safeguard himself as well as his wife? Would not such reasoning be justifiable? And if that is a sound reason then the holding in favor of the husband would not be arbitrary and not unconstitutional.

V

Under the established law of the State of New York there are but two tenancies in personal property, in common and joint. Under either tenancy one tenant may transfer to a third person an equal undivided one-half interest in the property. The only distinction between the two tenancies is that if a joint tenant does not sever the tenancy during the joint lives, then the survivor takes the whole. Under the Married Women's Acts in the State of New York, married women may own and deal with their personal or real property with the same freedom that a man may deal with his property, with any person including their husbands.

In the instant case the Court of Appeals has held that a wife may make a transfer to her husband and herself

as joint tenants, which is a right that all citizens of New York have. The Court of Appeals has simply decided that the wife may create a joint tenancy. That is not unconstitutional.

CONCLUSION

The petition for writ of certiorari should not be granted.

Respectfully submitted,

HARRISON B. WRIGHT,
Individually and as Executor of the Estate of Joseph Polizzo, deceased,
Respondent.

CERTIORARI

DENIED